**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-1997**

State of Minnesota,
Respondent,

vs.

Leun Thongpasom,
Appellant.

**Filed September 6, 2011**
**Affirmed**
**Worke, Judge**

Benton County District Court
File No. 05-CR-10-340

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Robert Raupp, Benton County Attorney, Foley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Ross, Judge.

**U N P U B L I S H E D  O P I N I O N**

**WORKE**, Judge

Appellant challenges his second-degree-murder and possession-of-a-firearm-by-an-ineligible-person convictions, arguing that (1) the evidence is insufficient to show that

he was not acting in self-defense; (2) the district court committed reversible error by accepting a stipulation to an element of the ineligible-person-in-possession offense without securing appellant's jury-trial waiver; and (3) the district court abused its discretion by imposing the presumptive sentence. We affirm.

## D E C I S I O N

### *Sufficiency of the Evidence*

A jury found appellant Leun Thongpasom guilty of second-degree murder, possession of a firearm by an ineligible person, and possession of a pistol without a permit. Appellant argues that the evidence is insufficient to support his second-degree-murder conviction because he acted in self-defense.

When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis to determine whether the jury reasonably could find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *Id.* We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

To support a conviction of second-degree murder, the state must prove beyond a reasonable doubt that the defendant caused the death of a person with the intent to effect

the death of that person or another, but without premeditation. Minn. Stat. § 609.19, subd. 1(1) (2008). The legal justification of self-defense is available when (1) the defendant did not act with aggression, (2) the defendant believed that he was in imminent danger of death or great bodily harm, (3) there were reasonable grounds for that belief, and (4) there was no reasonable possibility for the defendant to retreat or avoid the danger. *State v. Johnson*, 277 Minn. 368, 373, 152 N.W.2d 529, 532 (1967). The amount of force used in self-defense is "limited to that which a reasonable person in the same circumstances would believe to be necessary." *State v. Bland*, 337 N.W.2d 378, 381 (Minn. 1983).

Here, K.N. was pronounced dead upon arrival at the hospital after suffering from a close-range gunshot wound. Appellant caused the death of K.N. with the intent to effect that death because he shot him at very close range. Appellant claims that he feared K.N. because K.N. stabbed him. But the stabbing occurred one month prior to the shooting, and there is evidence that appellant treated it as a joke. S.K. testified that appellant told him that the stabbing was "just a little joke." L.S. testified that appellant told her that he and K.N. were intoxicated on the night of the stabbing and were playing a game to see if appellant was "powerful" and that it was a "cultural thing," because "most Asian people . . . believe that they have powers . . . . [and] practice like a Buddha thing to protect them, like if you stab them it won't go through the body." Appellant told L.S. that he would not report the incident to the police because he did not really care and would forget about it. But appellant also told L.S. that he was going to purchase a gun

and that "[w]hat goes around, what comes around," indicating that he intended to act with aggression toward K.N.

There is also evidence that appellant and K.N. got along well after the stabbing and that K.N. apologized to appellant. S.K. testified that after the stabbing, he believed that appellant and K.N. got along well. S.K. also testified that he heard K.N. apologize to appellant and heard appellant tell K.N. "Never mind." S.S. testified that on the night of the shooting he heard K.N. ask appellant if he was still mad at him and heard appellant reply, "No." S.S. saw K.N. attempt to hug or shake hands with appellant.

Sufficient evidence shows that on the night of the shooting, most witnesses failed to observe any altercation between appellant and K.N. S.S. testified that he observed appellant and K.N. wrestle and that he believed that K.N. wanted to beat up appellant. But even if that was the case, appellant had a duty to avoid physical contact if reasonably possible, and had a duty to limit the force he used to defend himself. Additionally, the determination of evidentiary weight and witness credibility rests exclusively with the jury, and will not be disturbed on appeal. *State v. Carufel*, 783 N.W.2d 539, 546 (Minn. 2010). We must assume that the jury believed the witnesses supporting the state's case. The record shows that appellant acted with aggression here and could not have reasonably believed that he was in imminent danger of great bodily harm. Thus, the evidence is sufficient to support appellant's second-degree-murder conviction.

***Stipulation***

Appellant next argues that the district court failed to obtain his personal waiver of his right to require the state to prove to the jury that he was ineligible to possess a

firearm, claiming that without his waiver, the jury was not required to determine whether he had a prior felony conviction, which violated his jury-trial rights. Appellant failed to raise this issue before the district court. This court reviews an unobjected-to alleged error under the plain-error analysis. *See State v. Kuhlmann*, 780 N.W.2d 401, 405 (Minn. App. 2010), *review granted* (Minn. June 15, 2010). Plain error affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If plain error is shown, this court may address the error only if it seriously affects the fairness and integrity of the judicial proceedings. *Id.*

Criminal defendants have the right to a jury trial for any offense punishable by incarceration. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The state is required to prove every element of the charged offense beyond a reasonable doubt. *State v. Paige*, 256 N.W.2d 298, 303 (Minn. 1977). A criminal defendant may stipulate to an element of an offense and waive the right to a jury determination on that element. *State v. Berkelman*, 355 N.W.2d 394, 397 (Minn. 1984). A valid waiver requires a defendant's personal waiver orally or in writing after being advised by the district court of the rights waived and having an opportunity to consult with counsel. Minn. R. Crim. P. 26.01, subd. 1(2). A defendant's counsel cannot waive the right to a trial by jury on behalf of the defendant. *State v. Halseth*, 653 N.W.2d 782, 786 (Minn. App. 2002).

When addressing waiver of jury-trial rights, this court has held that "the omission of the conviction-based elements of . . . the charges from the jury instructions without [the defendant's] personal, informed waiver [is] error." *Kuhlmann*, 780 N.W.2d at 405. This court further held that "[t]he lack of a personal, informed waiver on the conviction-

based elements" contravenes Minn. R. Crim. P. 26.01 and caselaw requiring a "personal, informed waiver to stipulate to an element of a crime"; therefore, meeting the second prong of the plain-error test. *Id.* This court determined, however, that when the stipulation covers only a single element of the charged offense, substantial rights are not necessarily affected because "the defendant can still compel witnesses to testify on [his] behalf, cross-examine the state's witnesses, challenge the state's other evidence, and argue the case to the jury." *Id.* at 406. And not only is the prejudice prong of the plain-error test not met, but a new trial is not warranted to ensure the fairness and integrity of the judicial proceedings because, given the state's evidence of the prior conviction and the benefit to the defendant of keeping that evidence from the jury, the defendant has received a fair trial, regardless of the waiver error. *Id.* We stated that in such a situation, a reversal and remand of the issue would likely result in a valid waiver and a nearly identical trial. *Id.*

Here, the following occurred:

> THE COURT: [M]y understanding . . . is that [appellant] intends to stipulate that he is a person defined by law who is ineligible to possess a pistol or a firearm?
> [APPELLANT'S ATTORNEY]: Correct, Your Honor.
> THE COURT: That is based upon the Assault in the Second Degree conviction from Hennepin County in 1990 for which he was discharged from probation in 1995.
> [APPELLANT'S ATTORNEY]: Correct, Your Honor.
> THE COURT: [Appellant] is also stipulating that Assault in the Second Degree is defined as a crime of violence under Minnesota law?
> [APPELLANT'S ATTORNEY]: Yes, Your Honor.
> THE COURT: [Appellant], do you agree with those stipulations?
> [APPELLANT]: Yes.

> [PROSECUTOR]: Your Honor, just so the record is clear, I would ask that [appellant] be asked whether he understands that he has the right to require the State to prove those elements to the jury.
> THE COURT: Do you understand that, [appellant]?
> [APPELLANT]: Yes.
> THE COURT: In discussions with your attorney you have agreed that it is better to stipulate that without requiring the State to prove it?
> [APPELLANT]: Yes.

Based on this record, appellant agreed to the stipulation but did not explicitly waive his right to a jury trial on the element covered by the stipulation. However, although the validity of the waiver is questionable, appellant cannot show plain error because he proceeded with a jury trial. Had appellant not stipulated, the state would have presented evidence of appellant's prior conviction. Appellant was benefitted by the jury not hearing that he has a felony assault conviction. Thus, this case is like *Kuhlmann*; reversal and remand would most likely result in a valid waiver and then a trial with the presentation of the same evidence as in appellant's first trial, or, if appellant chose not to stipulate to having a prior conviction, the state would present the prejudicial evidence of appellant's prior conviction to the jury. Appellant has failed to show that it was plain error for the district court to accept the stipulation.

***Sentence***

Finally, appellant argues that the district court abused its discretion in imposing the presumptive sentence because evidence showed that K.N. was the aggressor, entitling appellant to a lower-in-the-presumptive-range sentence. "An appellate court will not generally review the [district] court's exercise of its discretion in cases where the

sentence imposed is within the presumptive range." *State v. Witucki*, 420 N.W.2d 217, 223 (Minn. App. 1988), *review denied* (Minn. Apr. 15, 1988); *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) (stating that appellate courts rarely interfere with the imposition of a sentence within the presumptive range).

Appellant claims that the district court should have imposed the lesser sentence because a mitigating factor existed. But even if a mitigating factor existed, the district court is not required to depart from the presumptive sentence. *State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984). Further, a district court is not required to offer reasons supporting the imposition of a presumptive sentence. Minn. Sent. Guidelines II.C, .D (2009).

Here, the presumptive sentence for the second-degree-murder conviction was 366 months in prison. The lower end of the presumptive range was 312 months in prison, and the upper end of the range was 439 months in prison. The prosecutor suggested that the presumptive prison sentence was appropriate because of appellant's prior second-degree-assault conviction following a stabbing. Additionally, the pre-sentence investigation indicated that appellant failed to demonstrate remorse. And appellant's attorney stated that appellant continued to feel as if he were the victim. Although the district court was not required to provide reasons for imposing the presumptive sentence, the record supports this sentence. Thus, the district court did not abuse its discretion in sentencing.

**Affirmed.**